



IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION,

CAPE TOWN

REPORTABLE

Case No: **4933/2021**

In the matter between:

ROAD ACCIDENT FUND

Applicant / Defendant

and

ADVOCATE S BOTHA N.O.

Respondent / Plaintiff

on behalf of MICHAEL JAMES MIENIE

JUDGMENT

ANDREWS, AJ

Introduction

[1] This is an opposed interlocutory application in terms of which the Defendant seeks an order to have Mr Michael James Mienie ("the patient") assessed by an alternative Industrial Psychologist. The parties shall be referred to as they appear in the main action for ease of reference.

Factual background and chronology

[2] The Plaintiff instituted action against the Applicant flowing from a motor vehicle collision which occurred on 9 August 2018. Pursuant to a pre-trial hearing on 1 September 2022, it was agreed that the Defendant would file their expert reports on or before 30 November 2022 and that any joint minute would be filed on or before 5 December 2022. The pre-trial conference was postponed to 28 February 2023, where the Defendant confirmed that an assessment with an Industrial Psychologist was scheduled and that they would file all expert reports on or before 21 April 2023. In addition, Cloete J, issued a directive that the Defendant was to unequivocally state in the next pre-trial minute whether or not it accepted the serious injury. The pre-trial conference was accordingly postponed to 10 May 2023 for this purpose.

[3] The Defendant's Industrial Psychologist, Dr Zandile Madlabana-Luthuli ("Dr Madlabana-Luthuli") assessed the patient and furnished her report in March 2023. On 15 May 2023 the Industrial Psychologists compiled a joint minute followed by an addendum joint minute on 6 June 2024. Pursuant to the pre-trial conference on 10 May 2023, a trial certification bundle was agreed upon between the parties in preparation for a pre-trial conference on 7 June 2023. At the pre-trial conference held on 7 June 2023, the matter was certified trial ready on quantum by Cloete, J.

[4] The merits were conceded by the Defendant. The Defendant also accepted the serious injury sustained by the patient. The general damages aspect of the claim was settled in December 2023. The matter was enrolled for the determination of the remaining aspects of quantum on 19 November 2024.

[5] On 11 June 2024 the Defendant indicated that it does not bind itself to the joint minute and was intent on appointing a different Industrial Psychologist. The Plaintiff objected thereto. On 24 June 2024 the Defendant served a Rule 36(1) & (2) Notice. At the case management meeting held before Erasmus, J in July 2024, it was directed that the interlocutory application be heard as a matter of urgency. The parties were directed to apply for a date on the semi-urgent roll for the opposed application to be heard which application was initially set down for hearing on 16 October 2024.

Principal Submissions by the Defendant

[6] The Industrial Psychologist, Dr Madlabana-Luthuli, was appointed by the previous Claims Handler, Avuyile Tshofuti. Dr Madlabana-Luthuli assessed the Plaintiff on 31 March 2023 and the report was received on 4 May 2023. The matter was assigned to Mr Muhammad Arbee ("Mr Arbee") at the end of May 2023, who requested collateral documentation from the Plaintiff's attorney. Mr Arbee indicated that in the process of his assessment of the patient's loss of earnings, he noticed huge discrepancies between the bank statements and earnings stated by the Industrial Psychologist. This prompted him to seek clarity from the Defendant's Industrial Psychologist without success.

[7] The Defendant placed reliance on Rule 36(3), in terms of which the Plaintiff had to object within 5 days of receipt of the Notice in terms of Rule 36(1) & (2). In view that no objection was received, it was argued that the assessment was deemed by the Applicant to proceed. The appointment was made on 16 July 2024 but the patient did not attend the appointment which necessitated the launch of these proceedings. It is

the Defendant's contention that there will be no prejudice suffered if another Industrial Psychologist were to be appointed.

[8] The Defendant submitted that they had notified the Plaintiffs of their repudiation in keeping with the requirements set out in **Bee v RAF**¹ ("Bee") with a view to finalising the alternative appointment of an Industrial Psychologist timeously. The Defendant postulated the view that the court needs to be appraised of all information needed in order to make a fair and just finding on the loss of earnings. It was argued that there will be prejudice if the matter were to proceed on the information contained in the joint minute in circumstances where not all the information was taken into account.

Principal Submissions by the Plaintiff

[9] The Plaintiff contextualised the interchange between the parties after the Defendant had sent correspondence on 11 June 2024 in an attempt to repudiate the joint minutes between the Industrial Psychologists. The Plaintiff in reply, drew the Defendant's attention to the fact that a repudiation did not merely follow without a substantive application to obtain the leave from a court to that effect.

[10] It was further contended that the Defendant's recourse would have been to approach the court with a substantive application for repudiation as per the understanding at the case management meeting held on 29 July 2024. It was argued that the Defendant had launched this application with disregard to effective case management, more particularly the directive issued by the court on 29 July 2024. The Plaintiff asserted that the Defendant is attempting through this application to effectively

¹ 2018 (4) SA 366 (SCA).

sidestep a repudiation application, by merely insisting that the patient be assessed by a third Industrial Psychologist, without explaining to what extent the status of the joint minute shall be affected. Notwithstanding a detailed letter directed to the Defendant why their repudiation was not accepted, the Defendant approached this application incorrectly, without regard to the authorities that have regulated the processes that should be followed.

[11] In augmentation, the matter of *M on behalf of L, a child v Member of the Executive Council for Health: Gauteng Provincial Government*², was referred to where Wilson AJ, succinctly sets out the procedure for repudiation, namely that it should be an application to the trial court which should be granted on good cause shown.³

[12] The Plaintiff also referred the court to the judgment of *Bee* where it was held that parties are bound by the agreements reached between their respective experts. In this regard, it was submitted that the Defendant now wishes to renege from the joint minutes, more specifically the pre-morbid career path as agreed upon between the Industrial Psychologists. In further amplification the Plaintiff referred to additional relevant legal principles identified in *Bee* ⁴. In this regard it was argued that a fundamental feature of case management, here and abroad, is that litigants are required to reach agreement on as many matters as possible so as to limit the issues to be tried. It was submitted that effective case management would be undermined if there were unconstrained liberty to depart from agreements reached during the course

² (A5015/2020) [2021] ZAGPJHC 501 (8 October 2021).

³ At para 38.

⁴ At paras 384D, F, I, J, G, B and C respectively.

of pre-trial procedures, including those reached by the litigants' respective experts. With the result, there would be no incentive for parties and experts to agree on matters because, despite such agreement, a litigant would have to prepare as if all matters were in issue. Additionally, where the experts have met and filed joint minutes, the joint minutes will correctly be understood as limiting the issues on which evidence is needed.

[13] **Bee** further postulates that in the absence of repudiation, the other litigant is entitled to run the case on the basis that the matters agreed upon between the experts are not in issue. Facts agreed upon by the experts are binding unless a litigant timeously repudiates the agreement which is in keeping with the settled approach that repudiation must occur clearly and timeously. Even in circumstances the agreed matter is one of opinion, rejection of the agreed opinion must be timeously raised.

[14] Litigants cannot be expected to adduce evidence on agreed matters. Unless the trial court itself were for any reason dissatisfied with the agreement of the experts and alerted the parties to the need to adduce evidence on the agreed material, the trial court would be bound to accept matters agreed upon by the experts. The Plaintiff submitted that the Defendant failed to show good cause as is required of a party seeking to repudiate and suggested that the Defendant has approached the application in the manner it had for tactical reasons. It was contended that the Defendant's, approach calls for the court to speculate as it has not set out the reasons for repudiating. The Plaintiff reiterated that **Bee** is clear that the court is bound by the agreement. It was also highlighted that effective case management would be

undermined if there were unconstrained liberty to depart from agreements reached during the course of pre-trial procedures.

Legal position on repudiation and discussion

[15] The relief sought by the Applicant in these proceedings is for an order to have the patient assessed by an alternative Industrial Psychologist in circumstances where the patient was already assessed by various experts such as a neurosurgeon, psychiatrist, occupational therapist and industrial psychologist. Experts reports were compiled. The exposition of the chronology, elucidated that the Defendant's Industrial Psychologist, Dr Madlabana-Luthuli, assessed the patient and furnished her report in March 2023. This, after the Plaintiff's Industrial Psychologist, Ms Barbara Grobbelaar, had already filed her report on 14 December 2021. In or during May 2023, the Industrial Psychologists attended to a joint minute, followed by an addendum joint minute.

[16] It was only after the matter was certified trial ready by Cloete J on 7 June 2023, that the Defendant, sent correspondence to the Plaintiff, dated 11 June 2024 wherein they effectively attempted to repudiate the joint minutes compiled by the Industrial Psychologists.⁵ Needless to say, the request was not acceded to, with the Defendant's attention having been drawn to the prevailing authorities that the parties are bound by the joint minute.

[17] At this juncture it is important to emphasise that these developments ensued subsequent to the pre-trial hearing on 7 June 2023 where a compliance

⁵ Application Bundle, Annexure B, pages 11 -12.

certificate was filed and the matter declared trial ready on quantum by Cloete J. The seminal judgment **Bee**⁶ distils the relevant legal principles of effective case management insofar as it pertains to expert witnesses having signed a joint minute:

‘...A fundamental feature of case management, here and abroad, is that litigants are required to reach agreement on as many matters as possible so as to limit the issues to be tried. Where the matters in question fall within the realm of the experts rather than lay witnesses, it is entirely appropriate to insist that experts in like disciplines meet and sign joint minutes. Effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached during the course of pre-trial procedures, including those reached by the litigants’ respective experts. There would be no incentive for parties and experts to agree matters because, despite such agreement, a litigant would have to prepare as if all matters were in issue...’ [my emphasis]

[18] The court in **Bee** pertinently opined that ‘if a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation (i.e. fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue’⁷ Repudiation must occur clearly and timeously.⁸ The approach adopted in **Bee** was endorsed by a unanimous decision of the Supreme Court of Appeal in **MEC for Health and Social Development, Gauteng v MM on behalf of OM** ⁹.

[19] In casu, the Defendant, directed a letter dated 11 June 2024, to the Plaintiff’s attorney. The salient excerpt of the correspondence is deemed apposite to

⁶ *Ibid* para 65.

⁷ *ibid* para 66.

⁸ *ibid* para 69.

⁹ [2021] ZASCA 128 at para 16.

provide the contextual framework which in my view is germane to the outcome of this application:

'...'

*We wish to inform the Plaintiff that the Defendant hereby **repudiates** the joint minutes between Industrial psychologists Barbara Grobbelaar and Zandile Madlabana dated 15 May 2023.*

*The Defendant further wishes to inform the Plaintiff that the addendum joint minutes between Industrial Psychologists Barabara Grobbelaar and Zandile Madlabana dated 06 June 2023 are hereby **repudiated**.*

The reasons for such repudiation are as follows:

....

It is for these reasons that the Defendant has file (sic) a Rule 35(3) requesting further discovery to investigate the matter further to ensure fairness and justice prevails for all parties...'

[20] The Defendant contended that this letter ought to be regarded as the “clear and timeous” repudiation as envisaged in **Bee**, with a view to preventing a postponement of the trial. For reasons not entirely clear, this application was ultimately only set down for hearing on the day of trial, which defeated the entire objective of the timeous launch of a repudiation application. The Defendant correctly referenced out of the **Bee** judgment the consequences of a litigant’s failure to deal with the issue of repudiation in circumstances where repudiation only occurs during the course of the trial. In this regard, Rogers AJA, as he then was, held that:

*‘The trial court would be entitled to insist on a **substantive application** from the repudiating litigant’ [my emphasis]*

[21] In *casu*, it is manifest that the Defendant was aware that it would have to bring a substantive application. This, because of the impasse between the parties

in relation to the status of the joint minute compiled by the Industrial Psychologists dated May 2023. In the absence of an agreed way forward, a directive was sought from the case management Judge. Thereupon, the case management Judge Erasmus, J directed at the case management meeting held on 29 July 2024, that a substantive application is to be brought for the repudiation of the joint minute.

[22] The Plaintiff mooted that this application is in essence an attempt to sidestep a repudiation application by merely insisting that the patient be assessed by a third Industrial Psychologist. This exposes an obvious void that the Defendant could not explain at the hearing of the application when confronted about why there was no prayer for repudiation as it was manifest that the Defendant had at all times intended to repudiate the joint minute as is evident from the excerpt of the letter quoted earlier in this judgment. The letter that purports to have repudiated the joint minute provides the following reasons for the repudiation:

- (a) Neither of the two Industrial Psychologists attended to a proper investigation on collateral information or on the reported earnings prior to compiling their reports nor was this done prior to compiling the joint minutes;
- (b) The bank statements for Mr. Mienie that was received after the joint minutes or addendum joint minutes were compiled indicate that the earnings agreed to by the Industrial Psychologists, especially those earnings at the time of the accident, are not supported by such bank statements and as such the joint minutes will probably result in severe financial prejudice to the Defendant.

[23] The Plaintiff's Attorneys responded thereto on 12 July 2024 and illuminated, amongst other things, that the joint minute and addendum was compiled

in May 2023 and highlighted that the Defendant had ample opportunity to consider the content of the respective reports and joint minutes and could request such further clarification it required from either the Plaintiff or Dr Madlabana-Luthuli. They further elucidated, that was purportedly central to the focus of the late addition assessment, being the patient's pre-morbid earnings, is a non-issue.

[24] The Plaintiff then went on to proffer their reasons for their assertion as follows:

- (a) The patient advised that at the time of the collision, he was paid per hour with the number of hours worked, fluctuating weekly;
- (b) The earnings gleaned from the statements available from December 2018 to March 2019 was disclosed and
- (c) The experts are in agreement with regard to employment at the time of the collision which is factually borne out by the deposits into the patient's bank account as reflected in the bank statements furnished to the defendant.

[25] The claims handler, Mr Arbee, who attested to the supporting affidavit to this application, dedicates a single paragraph of relevance, to augment this application wherein he stated:

'13. On or around May 2024, I commenced with the assessment of the Loss of Earnings aspect of the claim when I noticed huge discrepancies between the bank statements and earnings stated by the Industrial Psychologist. I then requested clarity from the Defendant's Industrial Psychologist without success. Email communication in this regard is marked "Annexure A".'¹⁰

¹⁰ Application Bundle, Affidavit in support of application, para 13, page 7.

[26] In this affidavit, Mr Arbee explicated that this matter was allocated to him at the end of May 2023. It is noteworthy that he only commenced with the assessment of the Loss of Earnings aspect of the claim in May 2024, a full year later. It is apparent that he requested collateral documents from the Plaintiff's Attorney around November 2023, in relation to the general damages aspect of the claim which was settled in December 2023. There is no explanation why he only commenced the assessment in May 2024 and shortly thereafter a repudiation follows subsequent to an email addressed to one "Gugu Nomonde Dhlamini" dated 10 June 2024 went unanswered. This email contained a solitary sentence to the effect "Please advise how the R190 000 p/annum was confirmed for pre-accident earnings".¹¹ The very next day, 11 June 2024, the claims handler sends off communication to the Plaintiff's attorneys, repudiating the joint minute.

[27] It is startling, to say the least, that Mr Arbee in his affidavit states that he requested clarity from the Defendant's Industrial Psychologist **without success**. It bears mentioning that he sent this email on 10 June 2024 at 4:42 and the very next morning on 11 June 2024 at 9:23 am Mr Arbee sends an email to the Plaintiff's attorneys stating:

'...

We confirm that the RAF does not bind itself to joint minutes (sic) where the joint minute is based on reported earnings that are not supported or contrary to documentary evidence

The joint minutes in this matter was based on undocumented earnings which are contrary to bank statements as attached hence our request for further documentation which we have still not received

¹¹ Application bundle, "Annexure A", page 10.

We also confirm that both the IP's did not obtain all the necessary collateral in their reports and as such we wish to appoint another IP to attend to assessment of all the necessary collateral. The date for assessment is as follows...

Please confirm your client's attendance...'

[28] It is evident that Mr Arbee did not wait for any response from the Industrial Psychologist. Furthermore, Mr Arbee was informed on the 11 June 2024, that the patient would not be attending any further assessment by a new Industrial Psychologist. On 24 July 2024 a Notice in terms of Section 36(1) and (2) was served on the Plaintiff which states as follows:

'BE PLEASED TO TAKE NOTICE that Defendant requires Plaintiff to submit himself for medical examination by J.P VENTER (INDUSTRIAL PSYCHOLOGIST), JPV BUSINESS SOLUTIONS, REGUS WILLOWBRIDGE...on TUESDAY, 16 JULY 2024 at 10.00.

...

[29] Needless to say, the patient did not attend the consultation. The reasons for the Plaintiff's objection to the further notice in terms of Rule 36(2) was communicated to the State Attorney in the previously mentioned letter dated 12 July 2024 already. I deem it necessary to comment very briefly on the Defendant's decision to rely on the provisions of Rule 36(2) which falls under the heading "Inspections, Examinations and Expert Testimony". Whilst the Plaintiff does not take the point, the Notice appears to be non-compliant with the Rule. In light of the conclusion to which I have come, it is apposite to contextualise the overall shortcomings in the Defendant's approach to this application. Rule 36(2) must be read in conjunction with sub-rule (1) which essentially stipulates that a party to proceedings, in which damages or compensation in respect of alleged bodily injury is claimed, shall have the right to

require any party claiming such damage or compensation, whose state of health is relevant for the determination thereof, to submit to a medical examination. The patient in *casu*, had already submitted himself for examination by Dr Zayne Domingo a neurosurgeon; Prof. Tuviah Zabow, a psychiatrist; Nicolette Hugo, an occupational therapist and the two aforementioned industrial psychologists. The psychologists agreed that the patient's injuries have left him cognitively compromised by his traumatic brain injury (TBI), and struggles with behavioural challenges.

[30] The Defendant being armed with the various reports, and being alive to the patient's physical condition, notwithstanding, caused a notice to be served in terms of Rule 36(1) and (2), calling upon the patient, to yet again be subjected to yet a further examination. The Notice as earlier stated is defective in that it should *inter alia*, specify the nature of the examination required; the person or persons who shall conduct the examination; the place where and the date (being not less than 15 days from the date of such notice) and time when it is desired that the examination shall take place; and requires the other party to submit himself or herself for the medical examination at the specified place, date and time. Furthermore, the notice should also state that the party being examined may have his or her own medical adviser present at the examination; and be accompanied by a remittance in respect of the reasonable expenses to be incurred by the other party in attending the examination. Notably absent from the Notice is:

- (a) the nature of the examination required and
- (b) that he may have his or her own medical adviser present at the examination with the concomitant tender regarding the reasonable expenses incurred by the other party attending the examination.

[31] The unresponsiveness by the Plaintiff to a defective notice can hardly be interpreted to mean that the Plaintiff has acquiesced to the consequences as set out in the provisions on sub-section (3) which essentially stipulates that should the person receiving the notice not deliver an objection within the period of 5 days, such person shall be deemed to have agreed to the examination upon the terms set forth by the person giving such notice. It is presumably on the strength of this suggested non-compliance that the Defendant approaches this court to "be allowed to appoint an alternative Industrial Psychologist".

[32] This application is by all accounts irregular in its form for various reasons as it is brought in total disregard to the case management judge who directed that a repudiation application be brought and subsequent to a defective notice in terms of Rule 36. The Plaintiff argued *inter alia* that the application itself contains no explanation *a pro pos* to what extent the Industrial Psychologist erred in agreeing on facts contained in the joint minute. Apart from the reasons provided in the letter to the Plaintiff's Attorneys, it is apparent that no reasonable explanation is provided as to why they are reneging from the agreement. To simply address this with a broad brush stroke that there were huge discrepancies, in my view, is not sufficient if regard is had to the considerations as encapsulated in the authorities on point, to which I will refer to in more detail later in this judgment.

[33] The Defendant appeared to be of the mind that it does not require a formal repudiation application and that the application in *casu* ought to be regard as a repudiation application. The Defendant's misguided notice ignores the most obvious

first step in the process and that is to bring an application for the repudiation of the extant joint minute, which cannot simply be wished away.

[34] I pivot to return to the communique from the Plaintiff's attorneys to the State Attorney in terms of which it was referred to the reported judgment of this division where Sher AJ, as he then was, in ***Cape Town City and Others v Kotze*** ("Kotze")¹² highlighted that a Defendant's prerogative to direct second medical examinations in matters of this nature is not unfettered. In fact, ***Kotze*** pertinently deals with the purpose of Rule 36 which was essentially enacted to deal with difficulties in obtaining information pertaining to the assessment of a patient's injuries and damages claimed from independent sources. In *casu*, similar to ***Kotze*** the patient had already been subjected to numerous medical examinations. I agree with Sher J, as he now is, that the effect of applying a strict interpretation of Rule 36, in the milieu of the factual matrix of this matter, triggers a closer inspection of its impact on the patient's constitutional rights entrenched in the Bill of Rights such as the right to freedom and security and subsumed therein, the rights to bodily and psychological integrity.¹³ Sher J, citing the authority of ***Bernstein and Others v Bester and Others NNO*** ¹⁴ with approval, remarked that Tshiki J was of the view that such an invasion of the right to privacy "is exactly what is contemplated by the wording of Rule 36".¹⁵ Indeed, interest of justice considerations may inform a limitation on the patient's rights to bodily integrity, privacy and dignity; however, a court is enjoined to effectively regulate any abuses of the rule.¹⁶ In this regard, Sher J's approach can safely be applied to the matter in *casu*:

¹² 2017 (1) SA 593 (WCC).

¹³ The Constitution of the Republic of South Africa, Act 108 of 1996, Section 12; *Kotze* *ibid* 601G-H.

¹⁴ 1996 (2) SA 751 (CC).

¹⁵ *Kotze* *ibid* 604B-D.

¹⁶ *Kotze* *ibid* 606E-F.

'Where a court is of the view that a medical examination is likely to result in an invasion of a party's personal privacy and bodily integrity in circumstances where this is not necessary and the information can be obtained in another manner, or it will cause the party to suffer undue hardship or inconvenience, or physical, emotional or psychological distress or pain, it should not allow the examination to go ahead, or should put conditions in place to safeguard the examinee's rights...I can see no reason why, if an examinee is likely to be materially prejudiced in the sense I have outlined in regard to any bodily or mental examination, he or she should not similarly be entitled to refuse to submit thereto.'

[35] The Plaintiff submitted that it is egregiously unreasonable to compel the patient to submit himself to a further assessment; more particularly in circumstances where the Defendant does not approach the Court with clean hands. The Defendant's incontrovertible neglect of the matter has informed the approach taken by it in an attempt to skirt and/or circumvent the very issue of repudiation.

[36] I do not agree with the Defendant that this application is to some measure a repudiation application, as no basis is expounded on in the application for such relief. In any event the matter of ***Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd***¹⁷, Nienaber JA, addresses this very issue by stating the following:

'Repudiation is "a serious matter" ...requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed.'

[37] It is trite that litigants should not be encouraged to repudiate agreements for "tactical reasons", as remarked by Justice Rogers, as he now is, in ***Bee***.¹⁸ In this

¹⁷ 2001 (2) SA 284 at 285B.

¹⁸ *Bee* *ibid* at 69 'Litigants should not be encouraged to repudiate agreements for tactical reasons. Whatever may have been the attitude to litigation in former times, it is not in keeping with modern ideas to view as a game. The object should be just adjudication, achieved as efficiently and inexpensively as reasonably possible. Private funds and stretched judicial resources should only be expended on genuine issues.'

regard, the Plaintiff pointed out to the Defendant that the patient will suffer severe prejudice should the Defendant be allowed to repudiate the joint minute at this late stage of the matter with a view, to essentially “shop for a more favourable opinion”. The Plaintiff asserted that upon a careful analysis of the founding affidavit, the Defendant demonstrated that it seeks to in essence ingeniously ignore the agreements reached in the joint minute by the respective Industrial Psychologists in an attempt to circumvent the unequivocal findings agreed between them.

[38] It is settled law that the joint minute constitutes a binding agreement between the parties as was affirmed by the approach of the Full Bench of the Gauteng Local Division in ***M on behalf of L, a child and MEC for Health, Gauteng Provincial Government***¹⁹ (“*M on behalf of L*”) where it was held that:

‘...evidence should not have been admitted, because it sought impermissibly to undo agreements previously reached by the parties’ experts. In the circumstances of this case, those agreements were binding on the parties, and on the trial court.’

[39] It therefore follows that the status of the joint minute, which enjoys the same status as facts which are common cause on the pleadings or facts agreed to in a pre-trial conference, cannot lightly be undone without a substantive application for repudiation. This court cannot depart from the binding authority of the Supreme Court of Appeal (“SCA”), in the matter of ***MEC for Health, Eastern Cape v DL obo AL***²⁰ which dealt with a situation in which an agreement had been reached in a joint expert minute, but then evidence contrary to that agreement had been led by another expert during the trial. The evidence in this regard appears to have been led without clear

¹⁹ Case Number A5015/2020 [2021] ZAGPJHC (8 October 2021), para 29.

²⁰ [2021] ZASCA 68 at para 24.

repudiation of the agreement, and in those circumstances, the SCA held that the trial court was not entitled to have regard to the evidence led contrary to the expert agreement. Therefore, in *casu*, if the court were to grant the relief sought by the Defendant it would lead to much the same scenario as there exists a possibility that the evidence will be contrary to the expert agreement.

[40] This application has delayed the timeous adjudication of this matter which could have been prevented, had the Defendant taken heed to the direction of Erasmus J's and/or considered the proposal made by the Plaintiff, namely, that the Defendant should obtain an addendum report by Dr Madlabana-Luthuli in order to address the additional queries raised. To my mind, this would have been a sensible approach; given that the Defendant placed on record that the information came to hand after the joint minute was compiled, essentially informed the decision to launch this application for the appointment of an alternative Industrial Psychologist.

Conclusion

[41] The nature of the quantum trial in due course no doubt is likely to turn on expert evidence. Expert agreements and joint minutes provide a critically important way of framing the true issues for determination and of providing a logical framework within which a Court can come to a sound conclusion on facts of which it has no specialist knowledge.

[42] Even in circumstances where there is an application for repudiation, given the importance of expert agreements, their repudiation should be rare, properly

motivated and only granted where good cause is shown.²¹ It is further apparent from the **Bee** judgment that the SCA had in mind that the threshold for an applicant desirous to repudiate is that there must be good cause shown or at the very least, valid reasons must exist before a repudiation of this nature is to be allowed. **M on behalf of L**²² crystallises the considerations in determining good cause as follows:

'In seeking to show good cause, a party ought, at the very least, to identify the specific agreements sought to be repudiated, and the facts to which they relate; set out, clearly and succinctly, the new facts sought to be proved; to explain why those facts are so material to the issues at trial that they justify the undoing of the relevant expert agreements; and to demonstrate that the need to introduce those facts overcomes any prejudice caused to any other party by setting aside the expert agreements already reached.'

[43] This application in *casu* can at best be described as an anorexic application, falling dismally short of the threshold required for a repudiation application. It is uncontroverted that there is no substantive application for repudiation before me, which is unequivocally necessary and integral in circumstances where there is an extant joint minute compiled by experts. This requirement is consistent with the courts approach adopted in the aforementioned authorities in terms of regulating the processes that should be followed.

[44] In balancing the respective parties' rights and interests as contemplated in **Kotze** it is manifest that the Defendant has failed to make out a proper case on the papers for the relief it seeks; critically lacking in substance as to why the patient should,

²¹ *M on behalf of L*, *Ibid* para 38.

²² At para 38.

in the interest of justice submit to a further examination. As elucidated earlier in this judgment, the Defendant has clearly not accepted the directive of Erasmus J, which undermines the very reason case management has been ordained. Consequently, I am fully persuaded that the application that does serve before me was stillborn, is fatally defective and falls to be dismissed.

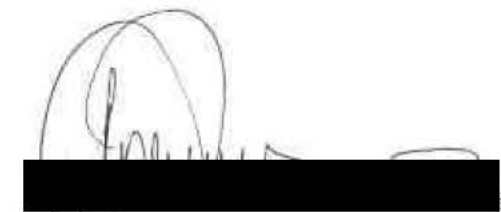
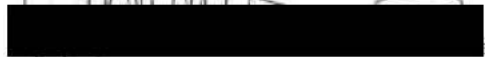
Costs

[45] The fiscal reality of the Road Accident Fund, a public body, is such that this manner of litigation should not be encouraged as it ultimately results in a waste of tax-payers money and is worthy of censure. I can therefore find no cogent reason why costs ought not to follow the result.

Orders:

[46] In the result, I make the following order:

- (a) The application is dismissed with costs, including the reasonable cost of counsel on scale "B"

P D ANDREWS

Acting Judge of the High Court of South Africa
Western Cape Division, Cape Town

APPEARANCES:

Counsel for the Applicant:

Advocate E Benade

Instructed by:

DSC Attorneys

Counsel for the Respondent:

Ms Claireese Thomas

The State Attorney

Heard on: 20 November 2024

Delivered: 29 November 2024

This judgment was handed down electronically by circulation to the parties' representatives by email.